No. 80-940

In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

LONE STAR STEEL COMPANY

and

UNITED MINE WORKERS OF AMERICA

BRIEF IN OPPOSITION TO A CROSS-PETITION FOR CERTIORARI IN 80-940

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UNITED MINE WORKERS OF AMERICA'S RESPONSE TO THE NATIONAL LABOR RELATIONS BOARD'S CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent, United Mine Workers of America, hereinafter referred to as the "Union," files this brief in support of the Cross-Petition for a Writ of Certiorari filed in this cause by the National Labor Relations Board, hereinafter referred to as the "Board." Respondent, Lone Star Steel Company, will hereinafter be referred to as "Lone Star."

STATEMENT OF THE CASE

The Board asks for review, under certain circumstances, of the ruling of the United States Court of Appeals for the Tenth Circuit concerning the "Application of Contract" clause contained in the 1974 contract between the Union and the Bituminous Coal Operators' Association. Lone Star was not a signatory to this instrument and consequently negotiations were held directly between Lone Star and the Union. When agreement could not be reached, the Union members struck the Lone Star coal mining facility known as the Pocahontas Mine near McAlester, Oklahoma.

Of the several unfair labor practice complaints which arose out of this dispute, one centered around the propriety of the Union calling the strike to enforce the application of a contract clause. An Administrative Law Judge found the clause not to be a mandatory subject of bargaining and therefore found that the Union committed an unfair labor practice by calling a strike to enforce this clause. The Board, on review, found the clause to be a mandatory subject of bargaining and finally the Tenth Circuit, agreeing with the Administrative Law Judge, found the Application of Contract Clause not to be a mandatory subject of bargaining. In supporting the Board's Cross-Petition to review this ruling the Union would urge that in making its decision the Tenth Circuit misapplied the previous case law and overstepped its scope of review.

REASONS FOR GRANTING THE WRIT

In finding that the application of contract clause was not a mandatory subject of bargaining, the Court held that the clause did not properly preserve the two-pronged requirements of *Local 24, International Teamsters, etc., v. Oliver,* 79 S.Ct. 297 (1959) which was established by this Court. The finding in *Oliver* was that in order for a subject involving employees outside the bargaining unit to be considered mandatory it must vitally affect the terms and conditions of employment or the job security of the unit employees and must represent a direct frontal attack on the problem threatening such interests. The Tenth Circuit found that the automatic application of this entire collective bargaining agreement, including its non-economic provisions, to other appropriate units employed at other facilities operated by Lone Star did not represent the kind of direct frontal attack on the problem demanded by *Oliver.*

Oliver involved a clause in a collective bargaining agreement which set rental payments for owners of trucks who leased their trucks to the companies and then were hired by the companies to drive those trucks. It was the Union's position that the companies were paying inadequate rentals to these owner-operators with the result that part of the owner-operator's wages were being used for the upkeep of the vehicles. The evil which the Union sought to curtail was the possibility that the carriers would make

rental payments and wage payments to the owner-operators which, when considering the fact that the rental payments were not themselves enough to pay for the upkeep of the trucks, were less than the wages being paid to the drivers who did not lease trucks to the carriers. The Union reasoned that in these circumstances the company would be willing to cut back on its policy of owning its own trucks and the hiring of Union drivers to operate them and turn increasingly to the use of owner-operators. This would, of course, threaten the job security of the Union truck drivers.

The Union's response to this threat, which this Court characterized as "a direct frontal attack," was a clause in the contract with the carriers which required the carriers to pay the owner-operators a rental for their trucks which at least equalled the cost of operating that truck thereby guaranteeing the same wage to owner-operators and drivers. This Court found the clause to be a mandatory subject of bargaining.

In the case at bar the Tenth Circuit recognized that the application of contract clause "vitally affected" the wages and working conditions of the unit employees involved. The record reflects that the clause was inserted in order to avoid the possibility of Lone Star operating another coal mining operation, hiring non-United Mine Workers of America workers at a lower wage and with fewer fringe benefits than were enjoyed by the Union

miners and then Lone Star shifting its operations to the new facility which could be operated at a substantially lower cost. This would be especially likely in a situation such as faces the party in the case at bar since Lone Star mined coal only for its own needs and not for a general market. Therefore, a mine producing coal cheaper than the mine in question would be a lure impossible for Lone Star to pass up.

The question then became whether the application of contract clause is a "direct frontal attack" on the problem. In *Oliver* the "direct frontal attack" was the imposition of a clause which preserved wages by insuring a certain level of retal charges. In the case at bar, wages are insured by, under certain instances, applying the same wage standards at other mining operations. The results sought by those clauses are identical, a guarantee of a certain wage. The means to that end are the same, guaranteeing a certain wage level by putting a burden on potentially cheaper methods of getting the same work done. In *Oliver* the company was required to pay certain compensation to owner-operators who performed for the company the same service, the driving of trucks, as did the Union members with the possible effect of costing the Union members their jobs. In the case at bar the company would be required to pay the same compensation to other miners who performed the same job as the Union members to this contract. The Union fails to see how one method is any

more or less a "direct frontal attack" of a problem than the other. Both seek to guarantee wages by making it impossible for potential competitors in the labor force to do the same job for lower wages.

Neither the Tenth Circuit nor Lone Star have pointed out, with precision, how the clause failed to meet the "direct frontal attack" test. They both simply state that conclusion. The objection which everyone seems to have to this clause is that it is "too broad." Even assuming that the clause has a wide ranging effect, this does not, in and of itself, make the clause illegal. In addition, the Union would argue that the finding of the Tenth Circuit, that the clause is too broad, is not a proper function of the Tenth Circuit's scope of review.

By finding the application of contract clause to be too broad the Court has improperly inserted itself into the negotiation process. The design behind the National Labor Relations Act and the National Labor Relations Board created thereby is to give management and labor an independent, but outside, referee whose purpose is to establish the rules by which management and labor reach contractual agreements. While the referee is to govern the rules of the negotiation and determine any violations thereof and the punishment therefore, the referee whould not participate in the negotiations themselves nor can it show favoritism to either party of the negotiation. If, in the opinion of the Board or the Court, one side of a labor

dispute is getting the better of the negotiations and is doing so by means which are within the provisions of the National Labor Relations Act neither the Board nor the Court can take any steps to correct what they might perceive to be an inequity. Such an intrusion would clearly be outside the scope of their authority. By finding the application of contract clause too broad the Court has commented not on its legality but on its quality. The Tenth Circuit seemed to be concerned that such a clause would put too heavy a burden on Lone Star.

However, the clause should be struck down only if it is illegal. No specific finding of illegality has been made by anyone who has heard this action. The only complaint that has been made about the clause is that is is too broad. The narrowing of the scope of a legal clause should be left to the negotiations of the parties involved. This would be a proper subject for negotiation. If Lone Star feels that the clause is too broad and would be an unfair burden on it, it easily could have proposed a similar clause with a narrower scope. It is this method of proposal and counter proposal that is the backbone of the country's national labor policy. The character of these negotiations should not be dictated to the parties by the Courts. The finding by the Tenth Circuit in this case that the application of contract clause was too broad is an unwarranted attempt by the Court to control the negotiations of the parties.

There is not dispute that the clause deals with the sub-

ject which vitally affects the members of the bargaining units. In addition, it seems clear that the approach contemplated by the clause is no less a direct frontal attack on a problem than the clause which was approved by this Court in *Oliver*. By finding the clause to be "too broad" but not having any ground on which to find the clause illegal, the Tenth Circuit made an unwarranted intrusion into the negotiation process. It is up to Lone Star, not the Courts, to protect itself from a legal, but possibly burdensome, clause. Because the application of contract clause in the case at bar did indeed meet the requirements of this Court in *Oliver* it was error for the Tenth Circuit to find it illegal.

CONCLUSION

For the reasons outlined above Respondent United Mine Workers of America prays that the Cross-Petition of the National Labor Relations Board in this matter should be granted as prayed for in its Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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